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Issue Date: 04 June 2004

CASE NO.: 2003-BLA-20

IN THE MATTER OF

FAYE M. KOCH
WIDOW OF ANTON KOCH,
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

DECISION AND ORDER DENYING BENEFITS

On August 7, 2000, Claimant filed the present claim for survivor benefits under the Black Lungs Benefits Act (the Act), 30 U. S.C. **§** 901, *et seq.* (DX-1). Claimant's husband, miner Anton Theodore Koch, died on July 10, 2000, having filed 4 previous and unsuccessful claims for benefits on January 14, 1971, April 5, 1978, November 13, 1985, and July 13, 1994. The only claim to be decided in these proceeding is the August 7, 2000 claim for survivor benefits.

On January 16, 2002, Administrative Law Judge Pamela Lakes Wood held a hearing on the survivor's claim and on February 26, 2002 issued a remand directing the District Director to obtain additional evidence from: (1) Dr. Enns as to the basis for his opinion on the death certificate, (2) the Cooper Clinic or Crawford County Hospital concerning the miner's treatment from 1994 to 2000, and (3) if deemed advisable a consultative medical expert report on behalf of the Director regarding Claimant's cause of death.. (DX-12).

On April 6, 2004 the hearing resumed in Forth Smith, Arkansas, before the undersigned. Claimant who was represented by counsel testified. The Director was represented by counsel and introduced without objection 26 exhibits including the following: claim for survivor and miner benefits (DX-2, 6, 7, 8, 9); miner's employment history (DX-2,) death certificate and medical records (DX-3, 4); statement of contested issues, hearing transcript of January 16, 2002 and Remand Order (DX-10, 11, 12); statement of Dr. Enns, records from Crawford Medical Center, North Logan Mercy Hospital, St. Edwards Mercy Medical Center and Cooper Clinic, National Jewish Medical Review. (DX-14-19).

Following the hearing Counsel for the Director was the only party to file a brief in this matter. Based upon the testimony, medical records and other exhibits and arguments from the parties, I find as follows:

I. Issues:

1. Miner's length of employment- Whether miner worked 20 years in one or more coal mines as alleged by Claimant or 18 years as conceded by Director, or a lesser period of time.

2. Pneumoconiosis- Whether miner had pneumoconiosis, and if so, did such a condition constitute a substantial contributing cause to miner's death.[1]

II. Parties Position.

Claimant contends that her husband had pneumoconiosis as a result of 20 years of coal mining work and that the pneumoconiosis was a substantial contributing factor to his death on July 10, 2000. Claimant testified that her husband worked in the coal mines from 1933 to the end of 1953, and then from April to September 1957, when he worked as a car loader for Quality Excelsior. (Tr. 11-12). Claimant further testified that her husband started having strokes in 1994 and had difficulty breathing requiring breathing machinery to remove excessive phlegm (Tr. 13).

Director, on the other hand, contends that miner had 18 years of coal mine employment and may have had COPD which in turn may be considered within the legal definition of coal worker's pneumoconiosis. However, Claimant never established by credible medical evidence, that miner's COPD was a substantial contributing cause to his death.

Under the Act, the term "pneumoconiosis" is defined as "…a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." The regulations state that "pneumoconiosis" includes both medical or clinical pneumoconiosis and legal pneumoconiosis with the latter, including any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. **§** 718.201. The legal definition of pneumoconiosis thus encompasses a wider range of afflictions than does the more restrictive clinical definition of pneumoconiosis, which consists only of those diseases recognized as such by the medical community. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (citing *Kline v. Director, OWCP,* 877 F.2d 1175, 1178 (3d Cir. 1989); *Hobbs v. Clinchfield Coal Co.,* 45 F.3d 819, 821 (4th Cir. 1995).

[1] Prior to the hearing the Director raised additional issues which were subsequently dropped concerning the (1) identity of a Responsible Operator,(2) constitutionality of regulations, (3) liability for medical and legal expenses, (4) unavailability of comparable work . (DX-10).

III. Length of Coal Mine Employment

As mentioned earlier, Claimant testified that miner worked in the mine from 1933-1953, and then again in 1957 from April to September, resulting in 20 years of coal mine employment. Supporting Claimant's assertion was form CM-911 filed out by miner showing his employment during these years in varying capacities as surface and tipple, loader, foreman, loader and hauler, (DX-2, 7,8). Also supporting this assertion were affidavits from co-worker and miners Roy L.Gray who worked with miner for all of 1933, Guss Crossno who also worked with miner for all of 1933; Ray M. Lloyd who work from 1934-1939 with miner as did miner, Marvin Cunningham; Gerald Martin worked with miner from January, 1951 to December 1953, as did miner Joe Martin. (DX-4).

Social Security records show the following earnings from coal mine employment in these years:

Employer	**Year**	**Quarters**	**Total**
Dixie Fuel Co.	1938 1939	2nd 1st, 3rd	$5.00 $66.55
Victor Coal Co.	1939	1st. 3rd	$25.90
Paris Purity Coal Co.	1939 1940 1941 1942	3rd, 4th 1st, 3rd, 4th 1st.3rd. 4th 1st, 3rd	$139.86 $566.14 $391.76 $39.85
Jewel Mining Co.	1941 1942 1943 1944	3rd, 4th 1st. 2nd, 3rd, 4th 1st, 2nd, 3rd, 1st, 2nd	$74.11 $ 1,531.21 $993.73, $ 646.58
Dixie Two Coal Co.	1944 1945 1946	2nd, 3rd, 4th, 1st, 2nd, 3rd,4th 4th	$1,368.55 $ 2,181.24 $50
New Shockley Mining Co.	1944 1945 1946-1949	4th 1st.4th, 1st-4th	$270,26 $158.74;$266.66 $2,272.80; $2,531.73. $3,000.00 $1,779.00
New Shockley Mining Co.	1950 1951	1st, 2nd, 3rd 1st	$1,683.88 $510.61
Bernice Coal Co.	1950	4th	$44.61
Union Pacific Coal Company	1950	1st .2nd	$$1.079.31

Having reviewed the Social Security records and crediting the above testimony, I find that miner had 20 years of employment. *Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984); *Combs v. Director, OWCP*, 2 B.L.R.1-904 (1980); *Harrell v. Pittsburgh and Midway Coal Co.* 6 B.L.R.1-961 (1984) (use of $50.00 rule to establish length of coal mine employment); *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984) (use of affidavits to establish length of coal mine employment). *See Hudson v. U. S. Dept. of Labor,* 851 F.2d. 515 (8th Cir. 1988). Thus, if miner who has over 10 years of coal mine employment can establish that he is suffering or suffered from pneumoconiosis, he is entitled to a rebuttable presumption under 20 C.F.R. § 718.302 that the pneumoconiosis arose out of such employment.

IV. The Medical Evidence

Miner had 4 chest x-rays taken from 1979 to 1994. The results are listed below and reveal no evidence of medical or clinical pneumoconiosis.

Exhibit Number	**Date of x-ray Date of reading**	**Physician**	**Credentials**	**Interpretations**
DX-7	9/21/79 10/02/79	J.A. Gill	Diagnostic radiology	Unremarkable chest, no radiographic manifestation of pneumoconiosis
DX-7	9/21/79 11/26/79	Jeremy Altman	B-reader	Film negative
DX-8	2/5/86 2/6/86	J.A. Gill	Diagnostic Radiology	Unremarkable chest; no radiographic manifestation of pneumoconiosis

During the same time period, miner underwent three pulmonary function tests which showed the following:

Exhibit	Date	Physician	Age/Height	FEV1	MVV	FV	Tracings	Effort
DX-7	9/21/79	David Nichols	59/5'8"	2.51	80.00	3.58	Yes	Good
DX-8	2/5/86q	W. Don Heard	66/67"	2.86	54	4.09	Yes	Fair
DX-9	8/8/94	W. Don Heard	74/67	2.18	67.38	3.58	Yes	

Also during the same period, miner had three arterial blood gas studies performed which showed the following:

Exhibit	Date	Physician	Test Result	pC02/p02
DX-7	8/27/74	Fred B. Berry	Resting After exercise	42.2/80.0 40.2/80.0
DX-8	2/5/86	W. Don Heard	Resting	37.0/71.0
DX-9	8/8/94	W. Don Heard	Resting	34/84 (Exercise medically contra-indicated

In response to Judge Wood's order, additional medical records were obtained from National Jewish Medical and Research Center in Denver, Colorado, (DX-19); Cooper Clinic of Fort Smith, Arkansas, (DX-17, 18); St Edward Mercy Medical Center in Fork Smith, (DX-16), and North Logan Mercy Hospital of Paris, Arkansas. (DX-15). No records were available from Crawford Memorial Hospital. (DX-14). Records from Cooper Clinic show treatment for facial basal cell epithelioma and squamous cell skin carcinoma in 1995 and 1997, left ventricular hypertrophy and transient ischemic attacks in 1999 with mild to moderate carotid artery disease with bilateral carotid plaque formation as early at January, 1994. St. Edward Mercy's records show miner undergoing a brain MRI on June 7, 1999 which revealed moderate small vessel chronic and ischemic change and atrophy with small lacunar infarct. North Logan Mercy's records show treatment for jaundice in 1997, mild cerebral atrophy and chronic ischemic changes in 1996, inflammatory synovitis of the right ankle in 1994.

On June 6, 1994, Dr. Wayne P Enns, in a letter addressed "To Whom It may Concern" stated:

> Anton Koch is a 74 year old male who gave a history of 20 years in the coal mines. He has never smoked in his life. Over the last several years he has been noted to have evidence of chronic obstructive pulmonary disease on his chest x-Ray. In investigation of the TIA's in January of this year, a color echocardiogram was performed. This showed: (1) left ventricular hypertrophy, (2) preserved left ventricular function; (3) no evidence of thrombus, (4) mild mitral regurgitation, and (5) mild to moderate hypertension.
>
> He has also had cardiac arrhythmia, well controlled with Lanoxin. Over the years of recorded blood pressures in his chart, he has not had an elevated blood pressure. It would certainly be highly suspicious that pulmonary hypertension was caused by his exposure to coal dust in the coal mines and in this way has contributed to his present problems.

(DX-13).

On miner's death certificate, signed by Dr. Enns on July 13, 2000, Dr. Enns listed the immediate cause of death as sepsis due to vascular dementia with black lung and CVA's contributing to the death. (DX-3). When questioned about his reason for listing "black lung" as a contributing cause, Dr. Enns in a March 3, 2004 letter to Claims Examiner, Deborah Brunger, stated:

> The reason that "Black Lung" was listed on Aton Koch's death certificate as a contributing factor was because of his chronic obstructive pulmonary disease and mild to moderate pulmonary hypertension, and subsequent TIA's and cardiac arrhythmia in a lifelong non-smoker who spent 20 years working in the coal mines. He had no other predisposing factor to develop chronic obstructive pulmonary disease and primary hypertension, which in turn then contributed to his TIA's and CVA and eventual death.

(DX-26).

In response to a further inquiry of August 29, 2002, by Claims Examiner, Mark Helfrich, Dr. Sverre Vedal, Professor of Medicine at the National Jewish Medical and Research Center in Denver, Colorado, by letter dated September 18, 2002 stated as follows:

This letter is in response to your request dated August 29, 2002 for medical review and opinion on the role of coal mining exposure in Mr. Koch's medical condition and death. I will briefly review the medical information provided by you and answer the questions posed.

Records reviewed included medical records dating from June 1997 through August 1999, Department of Labor evaluations in 1994 and 1986, and a coy of a death certificate from July

2000. It was estimated that Mr. Koch had 18 years of occupational coal dust exposure from the period of 1933 to 1957. The work was apparently sporadic with him working mostly in the winter months. He reportedly also worked for less than one year from 1943 to 1944 in shipbuilding and at an ironworks in 1943. He worked in construction from 1954 through 1956 and as a farmer and a trucker from 1958 to 1976. He worked briefly pulverizing wood in charcoal production from 1977 to 1979, and then worked as a farmer from 1980 until 1984 when he stopped working. He was reportedly a lifelong nonsmoker.

Review of the medical records provides evidence for the following problems:

1) Cerebrovascular disease based on a history of transient ischemic attacks, carotid duplex ultrasound showing mild bilateral carotid narrowing and a brain MRI showing acute or subacute small lacunar cerebral infarction, 2) dementia due to cerebral vascular disease, 3) cardio vascular disease reflected by left ventricular hypertrophy and mild diastolic dysfunction on echocardiogram, 4) mild chronic obstructive pulmonary disease (COPD) and 5) skin cancer due to both basal cell and squamous sell skin carcinoma. Mr. Anton died at age 80 on July 10, 2000. The death certificate reports sepsis as the immediate cause of death, with underlying cause of vascular dementia and contributing cause of "black lung and cerebral vascular accidents.

1. *Does the medical information establish pneumoconiosis?*

The current definition of pneumoconiosis, based on 20 C.F.R. 718.201, defines pneumoconiosis as "a disease arising out of coal mine employment [that] includes any chronic pulmonary impairment significantly related to, or subsequently aggravated by, dust exposure in coal mine employment.." Although Mr. Koch did not have pneumoconiosis as defined by interstitial fibrosis of the lung cause by coal dust exposure, it is more likely than not that he had coal worker's pneumoconiosis based on the above definition due to the presence of COPD. Spirometry dating back to 1977 showed a mild degree of airways obstruction. With no history of cigarette smoking and no apparent history of asthma, it seems justified to conclude that the airways obstruction was likely related to his years of coal dust exposure. Subsequent spirometry in 1986 and 1994 confirmed the presence of mild airways obstruction.

Reports of chest x-rays, including B-readings from 1986 and 1994, showed no evidence f interstitial fibrosis. Other x-rays, for example from 1992 and 1994, indicated evidence of COPD. An echocardiogram from 1994 found evidence of pulmonary hypertension, but a repeat study in 1999 showed no evidence of pulmonary hypertension. Arterial blood gasses in 1986 showed an alveolar-arterial gradient of 33 indicating a gas exchange abnormality. In 1994 the alveolar-arterial gradient on blood gases was 24, still somewhat elevated even for his age of 74. In 1977 there was a chest x-ray report indicating some reticulo-nodular infiltration at the left base, but this was not apparent on subsequent films. Also x-rays associated with a period of right pleuritic chest pain in 1986 reportedly showed a pleural effusion that resolved.

2. *What is the etiology for this disease process? Is it related exclusively to his coal dust exposure or other causes or a combination of factor, work exposures?*

Based on the presence of mild airways obstruction in 1977 and subsequently, and based on information provided above in response to question #1, I would conclude that the airways obstruction was primarily related to his coal dust exposure. While it is impossible to state conclusively that the airways obstruction was related exclusively to coal dust exposure, based on the absence of any other obvious contributors to his airways obstruction, it would seem reasonable to conclude that the coal dust exposure was the exclusive cause in Mr. Koch.

3. *If disease is found, is it related to his coal dust exposure or other exposures?*

Based on my responses to questions #1 and #2, his COPD was related to his coal dust exposure.

4. *Was his death caused by or hastened by a lung condition?*

There is no evidence that his death from sepsis and vascular dementia was related to his chronic obstructive lung disease, regardless of the claim on the death certificate that black lung was a significant condition to death, but not resulting in the underlying cause.

I hope the above has been responsive to your letter dated July 8, 2002. Please feel free to contact me at 303-398-1867 if you have any other questions.

> Dr. Enns and Dr. Vedal thus express totally divergent views with Dr. Enns' concluding that not only COPD related to coal mine work, but also pulmonary hypertension, also related to coal mine work which in turn contributed to miner's TIA's and CVA and eventual death.
>
> Counsel for Director correctly notes that Dr. Enns by letter of October 4, 2000 to Claimant substantially undermines his claim that miner's death was related to COPD when he said: "Unfortunately, so much of his last few years of illness were not directly related to black lung in a provable way. We have already sent them copies of his old x-ray reports, color echo reports from 1994 and his old visits going back as far as 1985 that had reference to his lungs. Unfortunately, there is nothing else we can do with that."

(DX-18).

V. Conclusion and Order

Pursuant to 20 C.F.R. **§** 718.204, Claimant to be successful in securing benefits must show by a preponderance of the evidence that Miner's total disability was due, at least in part, to pneumoconiosis. *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons, 9* B.L.R. 1-4, 1-6 (1986). Claimant must show that pneumoconiosis is more than merely a speculative cause of disability, but rather, a contributing cause of discernible consequence. To

the extent that a claimant relies on a physicians' opinion to meet this burden, the opinion must reflect reasoned medical judgment as opposed to vague or conclusory statements. *Grundy Mining Co., v. Director, OWCP, (Flynn)* 353 F. 3d 467 (6th Cir. 2003).

Having review the entire medical record, I find in agreement with Dr. Vedal that miner had COPD which was related to his coal mine employment. However, Dr. Enns' statements about black lung contributing to miner's death are unsupported by any definitive medical evidence. Rather, the medical records show that miner's death from sepsis and vascular dementia, and not COPD as confirmed by Dr. Vedal in his September 18, 2002 report.

Accordingly, since COPD or legal pneumoconiosis did not contribute in any substantial way to miner's death, I find that Claimant is not entitled to survivor benefits, and thus, her claim is denied.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE